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Supreme Court of the United States

October Term, 1970

~~No. 1730~~ 70-188

PECOLA ANNETTE WRIGHT, ET AL.,
Petitioners,

v.

COUNCIL OF THE CITY OF EMPORIA, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW

The petition accurately describes the opinions of the courts below except that it indicates that Judge Sobeloff dissented in this case. Judge Sobeloff did not participate in the appeal of this case from the District Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions and statutes referred to in the petition, the case involves:

1. VA. CONST. art. IX, § 133, which is set forth in the appendix to this brief in opposition at R.A. 1.*

2. VA. CODE ANN. § 22-93 (1950), which provides:

> The city school board of every city shall establish and maintain therein a general system of public free schools in accordance with the requirements of the Constitution and the general educational policy of the Commonwealth.

3. VA. CODE ANN. §§ 15.1-978 through 15.1-1010 (1950), which relate to the transition of towns to cities in the Commonwealth of Virginia. VA. CODE ANN. § 15.1-982 (1950), as in effect on July 31, 1967, is set forth in part at R.A. 2.

QUESTIONS PRESENTED

The preliminary statement contained in the section of the petition entitled "Questions Presented" (P. 2) is inaccurate and incomplete and thus provides a misleading foundation upon which the presentation of the questions involved is based.

The City of Emporia is not located within Greensville County. While it is surrounded by Greensville County, the City is politically, governmentally, and geographically independent of the County.

Additionally, the one sentence summaries of the reasons for the holdings of the courts below are, of course, incomplete and accordingly they sacrifice accuracy for brevity.

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* The following designations will be used in this brief:
R.A.—Appendix to respondent's brief in oppostion
P. —Petition for writ of certiorari
P.A.—Appendix to petition for writ of certiorari

The questions involved are:

1. Because of the unique independent status of cities in the Commonwealth of Virginia, are the issues here involved of such nationwide importance as to warrant a review and decision by this Court?

2. May the City of Emporia, Virginia, an independent political subdivision of the Commonwealth of Virginia, which was created in 1967 under long-standing state law for reasons unrelated to public school desegregation, operate a racially unitary and superior quality school system independent of the County of Greensville, which is a separate independent political subdivision of the Commonwealth?

3. Was the Court of Appeals correct in deciding that the constitutionally protected rights of the petitioners would not be violated if the City of Emporia operated a unitary school system independent of that operated by the County of Greensville, which decision was based upon the factual findings of the District Court?

STATEMENT

In their "Statement" petitioners call attention to the fact that this is "one of three cases decided together by the Court of Appeals involving the relationship between desegregation and the creation of new school districts" (P. 3). While this is true, it is important to note at the outset that there are various significant differences between this case, which involves a city in the Commonwealth of Virginia, and the other two cases, which involve school districts in the State of North Carolina. A detailed explanation of the Virginia system of local government is contained in a later section of this brief. At this point, however, attention is called to the fact that the City of Emporia was created under long-standing Virginia law and is completely independent of the County of Greensville for all purposes,

save one.[1] On the other hand, the North Carolina school districts were created pursuant to special acts of the North Carolina General Assembly adopted in 1969 and the areas involved are still a part of the county or counties out of which they were carved for all governmental purposes other than education.

On pages 4 and 5 of the petition, footnote 4, the background of the litigation is set forth. Some elaboration is necessary. The evidence was uncontradicted that the motivating factor behind the transition of Emporia from a town to a city was the desire of Emporia's elected officials to have the city receive the benefit of the state sales tax that had recently been enacted and to eliminate other economic inequities. There has been no charge by the plaintiffs that the decision to become a city was in any way motivated by the school desegregation situation. There was no finding by the District Court to impugn the motives or purposes of the City in effecting this transition. The Court of Appeals so indicated (P.A. 4a). Thus, it is clear that this is not a case in which an area has been "carved out" for the purpose of avoiding school desegregation.

Further, petitioners indicate that at the time Emporia became a city it was free to operate its own independent school system, but chose not to do so. The courts below were satisfied that Emporia considered so doing at that time, but determined that such was not practical immediately after transition.

The Court of Appeals stated:

> Emporia considered operating a separate school system but decided it would not be practical to do so immediately at the time of its independence. There was an effort to work out some form of joint operation with

[1] It shares with the County the cost of the circuit court and its clerk, the commonwealth's attorney and the sheriff.

the Greensville County schools in which decision making power would be shared. The county refused. Emporia finally signed a contract with the county on April 10, 1968, under which the city school children would attend schools operated by the Greensville County School Board in exchange for a percentage of the school system's operating cost. Emporia agreed to this form of operation only when given an ultimatum by the county in March 1968 that it would stop educating the city children mid-term unless some agreement was reached.

The District Court held:

> Ever since Emporia became a city consideration has been given to the establishment of a separate city system. A second choice was some form of joint operating arrangement with the county, but this the county would not assent to. Only when served with an "ultimatum" in March of 1968, to the effect that city students would be denied access to county schools unless the city and county came to some agreement, was the contract of April 10, 1968, entered into.

The contract of April 10, 1968, was limited to a term of four years expiring on July 1, 1971 (P.A. 73a).

On pages 6 and 7 of the petition, footnote 6, petitioners undertake to explain the Virginia system of school divisions and school districts. They erroneously state that when Emporia became a city "it could not operate a separate school system unless it was named a separate school division by the State Board." The Constitution of Virginia requires that supervision of schools in *each* county and city shall be vested in a school board. VA. CONST. art. IX, § 133 (R.A. 1). The Code of Virginia *requires* that the city school board of every city shall establish and maintain therein a system of schools. VA. CODE ANN. § 22-93 (1950)

(*supra* at 2). It sets forth the duties and powers of the city school boards. VA. CODE ANN. § 22-97 (1950) (P.A. 91a). While it is possible for a city and a county to be in one school division, each has its own school district, its own school board and each operates its own system. In such cases the boards are required to meet together only for the purpose of appointing a superintendent of the division who serves both boards but who administers each system separately. VA. CODE ANN. § 22-34 (1950) (P.A. 87a). The Constitution of Virginia permits supervision of such division to be vested in a single school board in which event the separate school boards cease to exist. VA. CONST. art. IX, § 133 (R.A. 1). The Code provides that such may occur only upon approval of the school board and the governing body of each of the political subdivisions involved. VA. CODE ANN. § 22-100.2 (1950) (P.A. 97a). The courts below found that the County refused to agree to a jointly operated system (P.A. 4a, 75a). It is therefore clear that under state law the City of Emporia has the power and duty to operate its own system of schools as a separate school district. The City sought to be constituted a separate division only so that it could employ its own superintendent (Transcript of the Proceedings, December 18, 1969, at 27).

On pages 7, 8, and 9 of the petition, reference is made to the reasons of the City for attempting to establish its own system and to the findings of the District Court at the time it granted the temporary injunction on August 8, 1969. At that same hearing, officials of the City also testified that the City's primary motive in seeking to establish its own unitary system was to afford better educational opportunities for its children than would be provided by the County of Greensville (Transcript of the Proceedings, August 8, 1969, at 120, 163, 164). However, the best summary of the purposes of the City is provided by the opinion

of the District Court on March 2, 1970, after it had heard the evidence at the hearing on the permanent injunction in December 1969:

> The city clearly contemplates a superior quality educational program. (P.A. 67a)
>
> * * *
>
> Emporia's position, reduced to its utmost simplicity, was to the effect that the city leaders had come to the conclusion that the county officials, and in particular the board of supervisors, lacked the inclination to make the court-ordered unitary plan work. The city's evidence was to the effect that increased transportation expenditures would have to be made under the existing plan, and other additional costs would have to be incurred in order to preserve quality in the unitary system. The city's evidence, uncontradicted, was to the effect that the board of supervisors, in their opinion, would not be willing to provide the necessary funds. (P.A. 75a)
>
> * * *
>
> The Court does find as a fact that the desire of the city leaders, coupled with their obvious leadership ability, is and will be an important facet in the successful operation of any court-ordered plan. (P.A. 76a)
>
> * * *
>
> This Court is satisfied that the city, if permitted, will operate its own system on a unitary basis. (P.A. 77a)

It is these findings of the District Court, which were made after the evidence was fully developed, that are controlling. Obviously, they supersede any conflicting findings made after the expedited and peremptory hearing on the temporary injunction.

On page 11 of the petition, petitioners state that the District Court concluded that the "establishment of separ-

ate systems would plainly cause a substantial shift in the racial balance." The facts upon which this conclusion is based are these:

Combined system	66% black;	34% white
Separate systems		
County	72% black;	28% white
City	52% black;	48% white

(P.A. 6a)

Petitioners then state that "the District Court concluded that the operation of separate school systems *would* have *serious* adverse impact on the provisions of the plaintiffs' constitutional rights" (emphasis added) (P. 11). The District Court simply did not say that. Rather it said:

> This Court is most concerned about the *possible* adverse impact of secession on the effort, under Court direction, to provide a unitary system to the entire class of plaintiffs. (Emphasis added.) (P.A. 78a)

It also said:

> But this [operation of a unitary system by the City] does not exclude the *possibility* that the act of division *might* have foreseeable consequences that this Court ought not to permit. (Emphasis added.) (P.A. 77a)

It is clear that the District Court considered any adverse effects of separate systems to be purely speculative.

Petitioners next proceed to summarize the majority opinion of the Court of Appeals (P. 12, 13). That summary is incomplete and therefore misleading. On page 13 of the petition, petitioners have selected statements from the opinion of the Court of Appeals and have placed them together in a manner that does not accurately depict the context in

which they were made. The majority did not conclude that Emporia would not be a "white island" *because* "there will be a substantial majority of black students in the county system." It concluded that Emporia would not be a white island because of the obvious and uncontradicted fact that it will have a system composed of a majority of black students. It did not conclude that "the effect of separation does not demonstrate that the primary purpose of the separation was to perpetuate segregation" solely because of the racial makeup of the two systems. It reached this conclusion based on all the findings of the District Court with respect to all the evidence presented.

Next, the petitioners state that "[S]ince the district court made no explicit 'finding of discriminatory purpose,' and because the school district officials advanced non-racial motives for the creation of a separate district," the majority held the injunction by the District Court to have been improvidently entered (P. 13). Again, the decision of the majority was not based merely on those grounds; rather, it was based on the record as a whole. It should be pointed out that not only did the Court of Appeals state "that there was no finding of discriminatory purpose," but it also stated that "the [district] court noted its satisfaction that the city would, if permitted, operate its own system on a unitary basis" (P.A. 8a).

The following is a summary of what the Court of Appeals did, in fact, hold.

It stated that if the shift in racial balance "is great enough to support an inference that the purpose" of the new school district "is to perpetuate segregation," the new district must be enjoined (P.A. 2a).

It stated:

> The creation of new school districts may be desirable and/or necessary to promote the legitimate state inter-

> est of providing quality education for the state's children. The refusal to allow the creation of any new school districts where there is any change in the racial makeup of the school districts could seriously impair the state's ability to achieve this goal.
>
> * * *
>
> If the creation of a new school district is designed to further the aim of providing quality education and is attended secondarily by a modification of the racial balance, short of resegregation, the federal courts should not interfere. If, however, the primary purpose for creating a new school district is to retain as much of separation of the races as possible, the state has violated its affirmative constitutional duty to end state supported school segregation. (P.A. 3a)

The Court of Appeals then proceeded to examine the evidence and the findings of the District Court on the question of the purpose of Emporia in becoming a city and in seeking its own school system. However, of equal importance, it also examined the *effect* of the so-called separation[2] of the school systems. It is impossible to determine the subjective purpose without considering the objective effect.

First, the Court of Appeals found that the purpose of Emporia in attaining city status was not to prevent or diminish integration. The Court stated that at the time Emporia became a city, July 31, 1967, "a freedom of choice plan approved by the district court" was in effect and the decision in *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), "could not have been anticipated by Emporia, and indeed, was not envisioned by this

[2] Actually, this case involves "consolidation" rather than "separation" since the systems were legally separated when Emporia became a city on July 31, 1967. Only because of the contract which expires on June 30, 1971, under its own terms, did Greensville County educate children of Emporia in its system.

court." (P.A. 4a). The purpose of Emporia in becoming a city was to receive the benefits of the newly enacted sales tax and to eliminate other economic inequities (P.A. 4a; Transcript of the Proceedings, August 8, 1969, at 118, 119).

Next, the Court of Appeals examined the purpose and effect of Emporia's decision in 1969 to operate its own system. After pointing out that if Emporia did so the City would have a majority of black students in its system and that a six percent shift of the racial balance of the Greensville County school system would be created, the Court stated:

> Not only does the *effect* of the separation not demonstrate that the primary purpose of the separation was to perpetuate segregation, but there is strong evidence to the contrary. Indeed, the district court found that Emporia officials had other purposes in mind. (Emphasis added.) (P.A. 6a)

The Court of Appeals then referred to the evidence of Dr. Neil H. Tracey, Professor of Education at the University of North Carolina, who testified that his studies were made with the understanding that it was not the intent of the City to resegregate[3]; that an examination of the proposed budget for the Greensville County schools indicated that it not only would not provide the funds required for increased transportation expenses necessitated by the pairing plan, but it would not provide the funds to keep up with the increased costs of operation due to inflation; that the tentative budget adopted by Emporia would provide increased revenues to increase the quality of education for its students; and that the proposed system of Emporia would be educationally superior to Greensville's system (P.A. 7a).

[3] Transcript of the Proceedings, December 18, 1969, at 68.

The Court of Appeals pointed out that "Emporia proposed lower student teacher ratios, increased per pupil expenditures, health services, adult education, and the addition of a kindergarten program." (P.A. 7a).

The Court of Appeals then stated:

> In sum, Emporia's position, referred to by the district court as "uncontradicted," was that effective integration of the schools in the whole county would require increased expenditures in order to preserve education quality, that the county officials were unwilling to provide the necessary funds, and that therefore the city would accept the burden of educating the city children (P.A. 7a).

Further, the Court of Appeals pointed out that because of the unusual nature of the organization of city and county governments in Virginia under which counties and cities are completely independent, Emporia had no representation on the governing body of the County or on the school board of the County. Thus, neither Emporia nor its residents have any means by which they can exert any influence or control whatever with respect to the education of the school children of the City (P.A. 7a, 8a). In conclusion, the Court of Appeals stated:

> The district court must, of course, consider evidence about the need for and efficacy of the proposed action to determine the good faith of the state officials' claim of benign purpose. In this case, the court did so and found explicitly that "[t]he city clearly contemplates a superior quality education program. It is anticipated that the cost will be such as to require higher tax payments by city residents." 309 F. Supp. at 674. Notably, there was no finding of discriminatory purpose, and instead the court noted its satisfaction that the city would, if permitted, operate its own system on a unitary basis (P.A. 8a).

The "Statement" portion of the petition concludes by setting out rather extensive quotations from the dissenting opinions of Judges Sobeloff and Winter.[4]

REASONS FOR DENYING WRIT

I.

The Issues Involved Are Not Of Critical Importance In The Process Of School Desegregation Because Of The Unique Structure Of Local Government In Virginia.

Petitioners are not correct when they state on page 15 of the petition that "[T]his case arises out of the repeated failure of the County School Board of Greensville County to propose an acceptable desegregation plan." Rather it arises out of the effort of petitioners to restrain the independent City of Emporia from operating its own unitary school system as all other cities in Virginia are permitted to do.[5]

This case is *not* the usual desegregation suit involving the constitutional validity of a desegregation plan (*e.g.*, *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, No. 281 O.T. 1970).

It is *not* a case where school district lines have been gerrymandered to affect the racial makeup of schools (*e.g.*,

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[4] Again, petitioners indicate that Judge Sobeloff dissented in the Emporia case though he neither participated nor voted in it. If any significance can be attached to his views so far as this case is concerned, then it should be noted that Judge Butzner, who likewise did not participate in it, was a part of the majority in the *United States* v. *Scotland Neck City Bd. of Educ.*, ... F.2d ..... (4th Cir. 1971), and must, therefore, be assumed to be in accord with the views of the majority in the *Emporia* case.

[5] The District Court found that Emporia contemplated operating "a superior quality educational program" (P.A. 67a) and would, if permitted by the courts, "operate its own system on a unitary basis" (P.A. 77a).

Haney v. *County Bd. of Educ.*, 419 F.2d 920 (8th Cir. 1969)).

It is *not* a case where a school district within a county or city has been divided by carving out a new school district consisting of primarily white students (*e.g., Burleson* v. *County Bd. of Election Comm'rs*, 432 F.2d 1356 (8th Cir. 1970)).

It is *not* a case where a new city or school district has been created by a special act of a state legislature (*e.g., United States* v. *Scotland Neck City Bd. of Educ.*, ... F.2d ....., Nos. 14929 and 14930 (4th Cir. 1971)).

Rather it is a case in which the independent City of Emporia, which became such on July 31, 1967, under general laws existing in Virginia since at least 1892[6], is seeking to operate its own school system, independently of that of the county of which it was a part prior to July 31, 1967, as all other cities in Virginia are entitled to do.

The decision of the Court of Appeals in this case does not constitute a precedent that would have wide spread application or effect in the area of school desegregation because of the unique structure of local government in Virginia and because of the factual context from which the case arises.

> In Virginia, counties and cities are independent of each other politically, governmentally and geographically.

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[6] The present Code of Virginia provides that a town upon attaining a population of 5,000 may elect to become a city of the second class for following the procedures set forth in the Code. Title 15.1, ch. 22, *Va. Code Ann.* (1950), as amended. The law has been substantially the same since at least 1892. *Acts of Assembly*, 1891-1892, ch. 595, at 934. Thus it is clear that the provisions under which the Town of Emporia acted to become a city have long been a part of the law in Virginia and were not enacted in any way as a result of the school desegregation suits or for any other racial reasons.

City of Richmond v. *County Bd.*, 199 Va. 679, 684, 101 S.E.2d 641, 644 (1958)

It is the only state in the United States having such a statewide system of local government.[7]

In *Murray* v. *Roanoke*, 192 Va. 321, 324, 64 S.E.2d 804, 807 (1951), the Virginia court stated:

> In Virginia, counties and cities are separate and distinct legal entities. . . . Citizens of the counties have no voice in the enactment of city ordinances, and conversely citizens of cities have no say in the enactment of county ordinances.

That this has been the law historically in Virginia is demonstrated by *Supervisors* v. *Saltville Land Co.*, 99 Va. 640, 39 S.E. 74 (1901).

This principle is applicable to a city that became such under the provisions of the law providing for the transition of towns to cities. In *Colonial Heights* v. *Chesterfield*, 196 Va. 155, 82 S.E.2d 566, 572 (1954), the Supreme Court of Appeals held:

> The town, upon becoming a city, separates from a political subdivision of which it was a part and becomes an independent political subdivision, except as to certain joint services specified in Code, § 15.104 [now § 15.1-1005].

Schools are not listed among the services specified in § 15.1-1005—that section is limited to the sharing of the costs of the circuit court and its clerk, the commonwealth's attorney, and the sheriff.

The Constitution of Virginia has, since 1928, vested the supervision of county schools in the county school boards

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[7] C. Bain, *"A Body Incorporate"—The Evolution of City-County Separation in Virginia* ix, 23, 27, 35 (1967); C. Adrian, *State and Local Governments* 249 (2d ed. 1967).

and the supervision of city schools in the city school boards. VA. CONST. art. IX, § 133 (R.A. 1).

Since at least 1919 the Code of Virginia has affirmatively required the city school boards to establish and maintain a system of schools in each city of the Commonwealth. VA. CODE ANN. § 22-93 (1950).

In *School Bd.* v. *School Bd.*, 197 Va. 845, 91 S.E.2d 654 (1956), dealing with the transition of a town to a city, the Supreme Court of Appeals of Virginia held that upon transition the new city is required by law to maintain its own school system.[8]

The Court of Appeals below stressed the importance of the unusual nature of local government in Virginia and the fact that because of it Emporia has no representation on either the governing body or the school board of the County of Greensville (P.A. 7a). If Emporia were to be compelled to remain tied to Greensville County, it would be helpless to exert any influence or control with respect to the school system attended by its children.

Since no other state has such a system of local government, this case is not of nationwide significance.[9]

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[8] "As a town, Covington was a part of Alleghany County whose public schools were operated by the county school board. When Covington became a city it ceased to be a part of the county, became completely independent governmental subdivision, and was required by law to maintain its own school system," 197 Va. at 847, 91 S.E.2d at 656.

[9] While the details of all the cases cited on page 17, footnote 10, of the petition are not known to counsel for respondent, it is noted that none arise from the State of Virginia. Because of the unique structure of local government in Virginia, the Emporia case could have little, if any, bearing on those cases. The case of *Burleson* v. *County Bd. of Election Comm'rs.*, 432 F.2d 1356 (8th Cir. 1970), it is distinguished on page 20 of this brief.

II.

Decision Of The Court Of Appeals Below Is Not In Conflict With Rulings Of This Court And Another Court Of Appeals.

Petitioners assert that the decision of the Court of Appeals for the Fourth Circuit is in conflict with the decision of this Court in *Green v. County School Bd.*, 391 U.S. 430 (1968), and with the decision of the Court of Appeals for the Eighth Circuit in *Burleson* v. *County Bd. of Election Comm'rs*, 432 F.2d 1356 (8th Cir. 1970). Reference is also made to the decision of this Court in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, No. 281 O.T. 1970.

An analysis of those decisions reveals that there is no conflict between them and the decision of the Court of Appeals below. Rather it is in complete accord with the principles enunciated by this Court in *Green* and in *Swann*. In making such an analysis consideration must be given to the facts of each case since principles of law cannot be applied in the abstract.

1. GREEN v. COUNTY SCHOOL BD., 391 U.S. 430 (1968) and SWANN v. CHARLOTTE-MECKLENBURG BD. OF EDUC., No. 281 O.T. 1970

In *Green* this Court held that freedom of choice plans could not be approved unless they *result* in the dismantling of dual systems. It there held that such a plan was not working in New Kent and thus could not be accepted.[10]

In *Swann* this Court examined the powers of district courts to require busing of children between attendance

[10] New Kent County had only two schools, one on each side of the county. There were 740 Negroes and 550 white students in the system. After freedom of choice had been in effect three years, one school remained all Negro and the other school had all the white students together with 115 Negro students.

zones of large metropolitan school systems as an aid to desegregation.[11]

Several important principles were established by those decisions with which the decision of the Court of Appeals below is in complete accord.

First, with respect to objectives, this Court held in *Green* that a unitary, nonracial system of schools is the ultimate end to be brought about (391 U.S. at 436) and in *Swann* that the objective is to eliminate from public schools all vestiges of state-imposed segregation (Slip Op. at 10).

In the instant case the City of Emporia would have a unitary, nonracial system of public education composed of approximately 52 percent black and 48 percent white. The Court of Appeals (P.A. 6a) and the District Court (P.A. 74a, 75a) so found. The County of Greensville would also have such a system composed of approximately 72 percent black and 28 percent white (P.A. 6a).

Second, this Court held in *Green* (391 U.S. at 439) and in *Swann* (Slip Op. at 23) that there is no *one* way to accomplish the objectives and that each case must be judged in light of the circumstances present and the options available.

In accordance with that principle, the Court of Appeals below recognized that flexibility in the operation of the school system is both desirable and permissible (P.A. 8a).

Third, this Court stated in *Green* that a plan which has been adopted in good faith and which has the real prospect of resulting in a unitary system "at the earliest practicable date . . . may be said to provide effective relief" (291 U.S. at 439).

In *Swann* the Court recognized that at some point school

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[11] The *Swann* case did not involve the interchange of children between independent school districts, but rather involved the interchange of students between attendance zones contained in one school system.

systems will be "unitary" and that subsequently intervention by district courts should not be necessary in the absence of a deliberate scheme to affect the racial composition of the schools (Slip Op. at 28).

Thus, it is clear that in two of the most recent decisions by this Court in school desegregation cases the elements of the "good faith" and of the "purpose" of the local authorities are considered to be important factors in determining the acceptability of a course of action. Even the dissenting judge in this case and Judge Sobeloff in the *Scotland Neck* case laid great emphasis upon the motive and purpose of the local authorities (P.A. 11a, 28a). Consideration by the Court of Appeals of the purpose of Emporia in attempting to set up its own system was clearly in accord with the decisions of this Court. Based on the findings of the District Court, the Court of Appeals held that the primary purpose of the separation was to provide better education and that the local authorities acted in good faith (P.A. 6a, 8a).

It should also be noted that this Court in *Brown II* recognized that consideration by the courts of the good faith of school authorities was both necessary and proper.[12]

Fourth, this Court in *Green* stated that school boards must come forward with plans that promise realistically to work now (291 U.S. at 438).

In *Swann* the Court said that a plan is to be judged by its effectiveness (Slip Op. at 21).

The Court of Appeals below complied with the mandate that a plan is to be judged by its effectiveness (P.A. 6a, 8a). While it stressed the importance of the purpose and good faith of the local authorities, it recognized that those factors must be judged in light of results. It further recog-

[12] *Brown* v. *Board of Educ.*, 349 U.S. 294 (1955), at 299.

nized that whether a plan will work or be effective means a good deal more than mathematical racial ratios.

In summary, the decision of the Court of Appeals below is in complete harmony with the decisions of this Court.

2. BURLESON V. COUNTY BD. OF ELECTION COMM'RS, 432 F.2d 1356 (8th Cir. 1970)

In the *Burleson* case, by per curiam opinion, the Court of Appeals for the Eighth Circuit affirmed the decision of the United States District Court for the Eastern District of Arkansas.[13]

That case is clearly distinguishable upon its facts from the Emporia case.

First, in *Burleson* the question was whether the Hardin Area of the Dollarway School District of Jefferson County, Arkansas, would be permitted to secede from that particular district and establish a new district *within* the same county. Apparently, in addition to the county board of education, each school district had its own "board of directors." For all purposes other than schools, it is assumed that the Hardin Area would remain a part of Jefferson County. In the instant case, the City of Emporia, under the law of Virginia, is already independent of Greensville County—politically, governmentally, and geographically.

Next, in the *Burleson* case the district court found:

> The population of the Area is almost exclusively white. In the fall of 1969 270 students residing in the Area were in attendance in the schools of the District, and only 5 of those students were Negroes.

308 F. Supp. at 353.

In the instant case, slightly over 50 percent of the stu-

[13] 308 F. Supp. 352 (E.D. Ark. 1970).

dents residing in Emporia are Negro. Thus, while the Hardin system would be composed almost entirely of white children, the Emporia system would be composed of almost an equal number of Negro and white children.

In *Burleson* the district court held that

> . . . as of this time and in the *existing circumstances* the proposed succession cannot be permitted and will be enjoined (Emphasis added).

308 F. Supp. at 358.

III.

Decision Of The Court Of Appeals Below Was Plainly Right.

This Court said in *Swann* that "[O]nce a right and a violation have been shown," the district court has broad powers to remedy the wrong; that "it is important to remember that judicial powers may be exercised only on the basis of constitutional violation"; and that "[J]udicial authority enters only when local authority defaults."[14] It further said:

> The basis of our decision must be the prohibition of the Fourteenth Amendment that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

Slip Op. at 13.

According to *Green*, the constitutional right of the plaintiff is to attend a unitary, nonracial system. According to *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969), at 21, it is the duty of local school authorities not to

> operate a dual system based on race or color, and . . . to operate as [a] unitary school system[s] within which no person is to be effectively excluded from any school because of race or color.

[14] *Swann*, Slip Op. at 11.

Here, there has been no violation of the constitutional rights of the plaintiffs as enunciated by this Court; likewise, there has been no default by the Emporia authorities. There has been no finding to the contrary. In fact, the District Court found that the City would operate a unitary system (P.A. 77a), and its previous order assures that such a system will be operated in Greensville County.

Only if plaintiffs are entitled as a constitutional matter to attend schools with a particular racial balance can it be held that plaintiffs' rights have been violated. Such a holding would be contrary to the holding in *Swann* that:

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

Slip Op. at 19, 20.

CONCLUSION

For the foregoing reasons respondents respectfully pray that a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

VIRGINIA CONSTITUTION

§ 133. *School districts; school trustees.*—The supervision of schools in each county and city shall be vested in a school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law. Each magisterial district shall constitute a separate school district, unless otherwise provided by law, and the magisterial district shall be the basis of representation on the school board of such county or city, unless some other basis is provided by the General Assembly; provided, however, that in cities of one hundred and fifty thousand or over, the school boards of respective cities shall have power, subject to the approval of the local legislative bodies of said cities, to prescribe the number and boundaries of the school districts.

The General Assembly may provide for the consolidation, into one school division, of one or more counties or cities with one or more counties or cities. The supervision of schools in any such school division may be vested in a single school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law. Upon the formation of any such school board for any such school division, the school boards of the counties or cities in the school division shall cease to exist.

There shall be appointed by the school board or boards of each school division, one division superintendent of schools, who shall be selected from a list of eligibles certified by the State Board of Education and shall hold office for four years. In the event that the local board or boards fail to elect a division superintendent within the time prescribed by law, the State Board of Education shall appoint such division superintendent.

* * *

VA. CODE ANN. (1950)

§ 15.1-982. Result of census; order.—If it shall appear to the satisfaction of the court, or the judge thereof in vacation, from such enumeration that such incorporated community has a population of five thousand or more, such court or judge shall thereupon enter an order declaring that fact to exist and thereafter such incorporated community shall be known as a city and entitled to all the privileges and immunities and subject to all the responsibilities and obligations pertaining to cities of this Commonwealth. . . .

No. 70-188

Supplemental brief in support of petition filed Aug. 9, 1971. Vide No. 70-187. SEE 70-187.